

IN THE SUPREME COURT OF THE STATE OF NEVADA

WINSTON BRUCE KELLY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52017

FILED

FEB 25 2010

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

This case arises from an incident where appellant Winston Kelly stabbed victim Peter Braun to death and stole Braun's truck. After this event, law enforcement officials arrested Kelly and interrogated him until he confessed to Braun's murder. Although Kelly requested an attorney on two occasions, officials did not stop the interrogation. During his confession, Kelly helped draw a map that led officials to the location of Braun's body.

Before trial, Kelly moved to suppress his confession and all evidence derived from the confession. The district court ruled that: (1) Kelly's confession and the map were inadmissible at trial because officials violated Kelly's rights under Miranda v. Arizona, 384 U.S. 436 (1966); (2) Kelly's confession could be used for impeachment purposes if Kelly testified; and (3) evidence of Braun's body was admissible at trial because Kelly gave a voluntary confession. At trial, a jury convicted Kelly of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

Kelly now appeals the judgment of conviction, arguing that the district court committed reversible error by admitting evidence of Braun's body at trial and by denying Kelly's motion to dismiss for lack of jurisdiction. For the reasons set forth below, we reject Kelly's arguments and affirm the district court's judgment of conviction. Because the parties are familiar with the facts and procedural history of this case, we do not recount them further except as necessary for our disposition.

DISCUSSION

I. While the district court erred by admitting evidence of Braun's body at trial, this error was harmless

Kelly argues that the district court erred by admitting evidence of Braun's body at trial. According to Kelly, evidence derived from his confession, including Braun's body, was inadmissible at trial because interrogators forced him to make an involuntary confession. Because we conclude that Kelly's confession was involuntarily made, we also consider whether the district court's admission of the evidence of Braun's body constituted harmless error.

A. Kelly's confession was involuntary

When reviewing the voluntariness of an in-custody confession, this court undertakes a two-step process. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). First, this court reviews the district court's factual findings about the circumstances surrounding the interrogation for clear error. Id. Second, this court reviews the district court's ultimate decision regarding voluntariness de novo. Id. Here, it is undisputed that Kelly was in custody at the time of his confession.

Due process requires confessions to be "made freely and voluntarily, without compulsion or inducement." Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). If a suspect's statements are involuntary, then any evidence obtained as a result of those statements is

inadmissible. Crew v. State, 100 Nev. 38, 43, 675 P.2d 986, 989 (1984). To determine whether a confession is voluntary, courts weigh various factors in a totality of the circumstances test. Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973). In this case, factors addressing whether Kelly's interrogators psychologically coerced him to confess are applicable to an inquiry into the totality of the circumstances surrounding Kelly's confession.

The first applicable factor is the lack of advice received by Kelly about his constitutional rights. Passama, 103 Nev. at 214, 735 P.2d at 323. We conclude that Kelly's lack of advice about his constitutional rights made him more susceptible to coercive police tactics. Similar to the officer's ineffective delivery of the Miranda warning in Doody v. Schriro, one of Kelly's interrogators, Captain Barclay, told Kelly that the Miranda warning was "to protect you and protect me." 548 F.3d 847, 862-63 (9th Cir. 2008). This suggested that the warning was "simply a meaningless bureaucratic step" that Captain Barclay had to take. Id. at 863. Captain Barclay also stated that "[i]f we ask you a specific question you don't want to answer, you just tell us that and we'll move right along okay?" This incorrectly suggested that the interrogation could continue indefinitely, even if Kelly invoked his right to silence.

The second applicable factor is Kelly's prior experience with law enforcement. Id. at 867. We conclude that Kelly's lack of experience with law enforcement made him more susceptible to coercive police tactics. Kelly grew up on a reservation governed by tribal law. Tribal law is different from law in the rest of the United States in many respects. One difference is that tribes are not required to supply the indigent accused with attorneys in felony prosecutions. 25 U.S.C. § 1302(6); U.S. v. Doherty, 126 F.3d 769, 778 (6th Cir. 1997), abrogated on other grounds by Texas v. Cobb, 532 U.S. 162, 168 & n.1 (2001). Due to this difference,

Kelly may not have been familiar with the right to counsel afforded during felony prosecutions in nontribal areas of the United States. Kelly's lack of awareness was likely reinforced when his interrogators failed to honor his requests for counsel.

The third applicable factor is the absence of legal counsel during Kelly's interrogation. Blackburn v. Alabama, 361 U.S. 199, 207-08 (1960). In this case, Kelly's interrogators questioned him after he invoked his right to counsel on two occasions.¹ Because the interrogators failed to honor Kelly's requests, we conclude that police coercion contributed to the overpowering of his free will.

The fourth applicable factor is the use of promises and threats during Kelly's interrogation. Passama, 103 Nev. at 215, 735 P.2d at 323. We conclude that Kelly's interrogators used threats to overpower Kelly's free will. Similar to Passama, where a sheriff threatened to speak with a prosecutor unless the defendant confessed, Kelly's interrogators threatened to tell a judge about Kelly's failure to provide information. Id.

Based on the totality of the circumstances surrounding Kelly's confession, we conclude that it was involuntary.² Because Kelly's

¹Kelly first invoked his right to counsel when arrested by stating "I want a lawyer." Kelly also requested an attorney during the interrogation by stating "I like to just wait and talk to a lawyer or something."

²When considering factors under the totality of the circumstances, we also considered Kelly's low intelligence and his interrogators' religious references. Kelly's intelligence did not make him susceptible to police coercion because he appeared oriented in time and place during the interrogation, answered questions coherently, and learned to use a touch-screen computer system in jail. His interrogators' religious references were not coercive because Captain Barclay only made general comments about God and had no knowledge of whether Kelly was particularly susceptible to such references. See People v. Adams, 192 Cal. Rptr. 290, *continued on next page . . .*

confession was involuntary, we conclude that the district court erred by admitting evidence of Braun's body at trial. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (explaining fruits arising from an agent's unlawful actions are inadmissible under the Fourth Amendment). We next determine whether the district court's admission of Braun's body constituted harmless error.

B. The district court's error was harmless

Kelly argues that the district court's admission of Braun's body at trial constituted harmful error. We disagree.

In this case, officials violated Kelly's constitutional right to due process. See Passama, 103 Nev. at 213, 735 P.2d at 322 (explaining due process requires that confessions be voluntary). Because the error involved a violation of Kelly's due process rights guaranteed by the United States Constitution, we must reverse the judgment of conviction unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Under the Chapman standard, courts must determine whether "it can be found beyond a reasonable doubt that the error did not contribute to the verdict." Dyer v. State, 99 Nev. 422, 423, 663 P.2d 699, 700 (1983).

Applying the Chapman standard, we conclude beyond a reasonable doubt that the district court's admission of Braun's body during trial did not contribute to the verdict. This conclusion is supported by the reasoning in West v. State, 119 Nev. 410, 75 P.3d 808 (2003).

... continued

299-303 (Ct. App. 1983), overruled on other grounds by People v. Hill, 839 P.2d. 984, 1003-04 n.3 (Cal. 1992).

In West, a jury convicted the defendant of killing her mother after officials discovered a human body decomposing in the defendant's storage unit. Id. at 411-12, 75 P.3d at 809. On appeal, the defendant argued that the prosecution introduced insufficient evidence at trial to show that her mother died due to a criminal act, as opposed to natural causes. Id. at 415, 75 P.3d at 812. Although officials could not determine the cause of death due to the body's advanced decomposition, there was sufficient circumstantial evidence to prove that the defendant murdered her mother. Id. at 418, 75 P.3d at 813. This evidence included: the circumstances surrounding the mother's disappearance, the discovery of the mother's body in defendant's storage unit, the defendant's admission that she put her mother in a garbage can, and the detection of a plastic bag covering the mother's nose and mouth. Id. at 418, 75 P.3d at 814.

Similar to West, we conclude that the circumstantial evidence is sufficient to prove that Kelly murdered Braun. See id. at 418, 75 P.3d at 813-14. The evidence shows that Kelly told his cousin, Delmar Kelly, that he planned to murder Braun. A deputy found Kelly sleeping alone in Braun's truck and saw blood running out from underneath the tailgate. Officials recovered a knife from the truck's bed with Braun's blood on the handle. Evidence of Braun's murder was found on Midas Road, including: Braun's cowboy hat, broken glass from the truck's passenger window, blood spots on the road, a pen and notebook, a knife sheath, and a plastic wing nut from the truck. Testing revealed that Braun's DNA was located on the cowboy hat, on Kelly's jeans, on the pen, on the truck's bed and steering wheel, on the handle of the knife, on the wing nut, and on Midas Road.

The circumstantial evidence establishing guilt in this case is overwhelming. Because there is overwhelming evidence of guilt, we conclude, beyond a reasonable doubt, that the district court's erroneous

admission of Braun's body was harmless and did not contribute to the verdict. See Johnson v. State, 92 Nev. 405, 407, 551 P.2d 241, 242 (1976) (ruling that the failure to give a limiting instruction was harmless error given the overwhelming evidence of guilt); Pacheco v. State, 82 Nev. 172, 179-80, 414 P.2d 100, 104 (1966) (concluding that a prosecutor's improper remark during closing arguments was harmless error because the verdict was free from doubt).

II. The district court properly denied Kelly's motion to dismiss for lack of jurisdiction

Kelly argues that Nevada does not have jurisdiction over him because there is no evidence that any acts in furtherance of Kelly's crimes were committed in Nevada. We disagree.

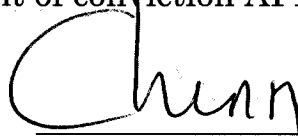
Pursuant to NRS 171.020, Nevada courts have jurisdiction when the defendant's criminal intent is formed in Nevada and an act "in pursuance or partial pursuance of the intent" is carried out in Nevada. Shannon v. State, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989). This means jurisdiction is possible in Nevada even when the crime at issue culminated in another state. Smith v. State, 101 Nev. 167, 169, 697 P.2d 113, 114 (1985). Jurisdiction under NRS 171.020 is a question of law. Shannon, 105 Nev. at 791, 793 P.2d at 948. We review questions of law de novo. Williams v. State, 121 Nev. 934, 943, 125 P.3d 627, 634 (2005).


In this case, jurisdiction in Nevada over Kelly is proper for two reasons. First, Kelly formed his criminal intent in Nevada because he met Braun and told his cousin that he planned to murder Braun while in Nevada. Second, officials found evidence on Midas Road, located in Nevada, showing that Braun was either killed or commenced dying while in Nevada. This evidence includes: a pen with Braun's DNA on it, a wing nut from Braun's truck with Braun's DNA on it, a swab taken from the

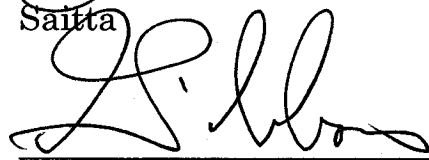
road with Braun's DNA on it, broken glass from the truck, Braun's cowboy hat, and a knife sheath.

Kelly also argues that it was improper for the jury to consider the issue of jurisdiction in Jury Instruction No. 6. We disagree. A plain-error analysis is appropriate in this case because Kelly did not object at trial to the inclusion of Jury Instruction No. 6. See NRS 178.602. "Generally, failure to object will preclude appellate review of an issue. This court does, however, have discretion to address issues not preserved for appeal where there is plain error affecting the defendant's substantial rights." Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001) (footnote and citation omitted). Here, there is no plain error affecting Kelly's substantial rights because the State's evidence indisputably established jurisdiction.³ Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

³Kelly also argues that this court should grant a new sentencing hearing because relevant mitigating circumstances about how he helped officials locate Braun's remains were not conveyed to the jury. We decline to do so because Kelly's brief did not cite legal authority addressing this issue as required by NRAP 28(a)(8)(A).

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk